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No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA;
STATE PERSONNEL BOARD STATE OF CALIFORNIA;
BOARD OF ADMINISTRATION OF
THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioners,

VS.

RETIRED PUBLIC EMPLOYEES' ASSOCIATION
OF CALIFORNIA, CHAPTER 22; AND
MRS. WINOFRED WHITE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. If a pension plan by providing sex differentiated benefits violated Title VII of the Civil Rights Act of 1964 but the plan was changed prior to the decision in *Los Angeles Dept. of Water & Power v. Manhart* (1977) 435 U.S. 702 so that comparably situated men and women who retired after the date of the change receive identical benefits are those individuals who retired prior to that change entitled to have their retirement benetfits raised so that the benefits become identical to the benefits of comparably situated members of the opposite sex?[1]

2. If plaintiffs are entitled to receive increased pension benefits, how is the two-year limitation created by 42 U.S.C. § 2000 e-5(g) to be applied to such benefits?

3. Does a retirement plan violate Title VII if a woman receives greater monthly benefits than a comparably situated man if both retire before age 60 but a man receives greater monthly benefits than a comparably situated woman if both retire after age 60?

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1. "Comparably situated" refers to employees who have identical characteristics in relation to the factors that determine retirement benefits (e.g., length of service) so that the two employees would receive identical benefits if both were of the same sex.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioners, State of California, State Personnel Board of the State of California and the Board of Administration of the Public Employees' Retirement System, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 17, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals appearing at 677 F.2d 733, is attached hereto as Appendix A. The opinion of

the District Court for the Northern District of California is attached hereto as Appendix B.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 USC section 2000e, *et. seq.* Particular emphasis is placed on section 2000e-2(a) and section 2000e-5(g). These pertinent portions are attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1982. No petition for rehearing was filed. This petition for certiorari was filed within ninety days of May 17, 1982. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

The Complaint's jurisdictional statement provides: "(1) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2000(e)(5)(f). Jurisdiction is also based on 28 U.S.C. § 2201 and § 2202 providing for declaratory relief. The jurisdiction of this Court is invoked to redress deprivation of and to secure protection of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(3), *et. seq.*"

The State of California operates the Public Employees Retirement System (PERS) for state employees; membership is also available to employees of other public entities which choose to utilize the system. Both the employer and the employee make periodic contributions to PERS. Benefits paid to retired employees are financed from these contributions and earnings on invested funds.

Since June 21, 1971, employees' contributions have been calculated as a percentage of their wages. Both men and women have, since that time, contributed the same per-

centage of their wages. But comparably situated men and women retiring before January 1, 1977, did not receive the same benefits.

If a man and a woman had identical work experience—if they started and ended their work at the same time and age and received the same wages at all times—they would not have received the same benefits upon retiring. If they had retired after age 60 the man would have received higher benefits than the woman. If they had retired before age 60 the woman would have received higher benefits than the man. Only if they had retired at age 60 would the benefits have been identical.[2]

Believing that such differentials in benefits violated Title VII, respondents filed actions in the Northern District of California seeking both to recover retroactive payments and an adjustment in all future payments.[3] The action was brought on behalf of a class composed of all persons receiving monthly retirement allowances from PERS and against the named defendants and a class of all employers who had contracted with PERS to provide retirement benefits to their miscellaneous employees. Following a

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2. California statutes were amended as of January 1, 1977 so that comparably situated men and women now receive the same benefits.

3. This case originally consisted of two actions (*Gunn v. State of California*, U.S.D.C., N.D. Cal. C-78-2070 RHS and *Retired Public Employees' Association of California, et al. v. State of California, et al.* U.S.D.C., N.D. Cal. C-77-2008 WAI) which were consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure . The case has proceeded under the name and number of the *Retired Public Employees' Association* case. That case also lists as defendants the Retirement Board of the Oakland Municipal Employees' Retirement System and the City of Oakland. No judgment has been rendered as to these defendants and they do not participate in this petition. All references to the complaint will be to the complaint in the *Retired Public Employees' Association* case (C-77-2008).

motion for summary judgment the district court granted judgment for plaintiffs. That judgment provides in pertinent part:

> 2. That the State defendants' present and continuing practice of paying pension benefits based on sex-based actuarial tables violates Title VII of the Civil Rights Act of 1964.
>
> 3. It is FURTHER ORDERED that in order to remedy the State defendants' treatment of the class found unlawful by this Court as set forth in its Order dated May 29, 1979, the Public Employees Retirement System shall raise monthly retirement benefits of members of the class to the level received by similarly situated members of the opposite sex without reducing the benefits of any individual. Such adjustments shall be retroactive to April 25, 1978, the date of the U.S. Supreme Court decision in *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978).

The Court of Appeals reversed "that portion of the district court's order requiring benefit payment adjustments for class members who retired prior to March 24, 1972" (677 F.2d at p. 738) while affirming the remainder of the order.

REASONS FOR GRANTING WRIT

INTRODUCTION

As the Court stated in *Los Angeles Dept. of Water & Power v. Manhart* (1977) 435 U.S. 702, 705, "As a class, women live longer than men." Pension funds have attempted to account for this disparity in one of two ways, (1) by requiring women to make larger contributions or (2) by giving women smaller benefits.[4] In *Manhart* the Court

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4. Plans in which the sex differentiation occurs in the amount required to be contributed by an employee while the employee is working will be identified as "contribution plans"; those in which the amount of benefit payments creates the sex differentiation will be identified as "benefit plans."

found that a contribution plan which required greater contributions by women than men violated Title VII (48 U.S.C. § 2000e et seq.). In the instant case the Ninth Circuit found the challenged benefit plan to be violative of Title VII because the benefits paid were dependent on sex and age at retirement.

Manhart concluded, for a number of specified reasons that even though women had been required for many years to make larger contributions than men the women were not to receive any retroactive pay. Because *Manhart* dealt only with larger contributions by women, it did not rule on the propriety of possible remedies for cases in which an individual received smaller benefits rather than making larger contributions. Certiorari should be granted in this case so that the application of the *Manhart* principles to such benefit plans can be clarified.

Because *Manhart* did not require any retroactive payments, it is silent on the application of the two-year limitation on back pay awards created by 42 U.S.C. § 2000e-5(g). Certiorari should be granted to clarify application of this section's limitation to benefit cases where the benefits are to be paid in the future but the benefits are based on labor performed more than two years before the filing of the EEOC complaint.

Finally certiorari should be granted to resolve a question unique to sex discrimination cases (as opposed to discrimination based on race, color, religion or national origin): can a retirement plan discriminate against both men and women so that the effect is discrimination against everybody?

I

MANHART PRINCIPLES CAN AND SHOULD BE APPLIED TO THE INSTANT CASE

Part IV of the *Manhart* decision, which deals with relief to be awarded in relation to a contribution plan, is phrased entirely in terms of retroactive relief. 435 U.S. at 718-723. That analysis was dictated by the language of 42 U.S.C. § 2000e-5(g) which refers to the award of "back pay" and by the facts of that case.[5] In *Manhart* the benefits were not sexually differentiated so there was no need for relief *in futuro;* the injury suffered by the women was in the form of past contributions and accordingly that injury could have been recompensed by an award of back pay.

If one looks behind the labels of *Manhart*, such as "back pay" and "retroactive relief", to the principles underlying the decision, it can be seen that the *Manhart* principles can properly be applied to a benefits case.

While *Manhart* involved back pay, it has been held that "a request for back pay is logically indistinguishable from the instant plaintiffs' request for enhanced retirement benefits," *Norman v. Missouri Pacific Railroad* (8th Cir. 1974) 497 F.2d 594, 597, cert. denied (1975) 420 U.S. 908. In reality *Manhart* dealt with the question of whether or not the women who had been injured by being required to make larger contributions than men should be recompensed for that injury.

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5. The language of section 2000e-5(g) which defines the relief available in Title VII actions highlights the difficulty in the instant case. The section seems to indicate that Congress contemplated only what was then considered to be the discriminatory practices to be outlawed (e.g., sex or race differentiated employment, pay and promotion, etc. patterns). These practices were properly remedied by an order correcting the practice and, within limits (see § III, p. 12-14, *infra*), making the injured party whole by an award of back pay. Congress did not seem to have in mind the problems presented by the future payments involved in benefit cases. The stress was consistently on "back pay".

The principle involved in *Manhart* is identical to that of the instant case where the issue is whether or not the individuals who will be injured by receiving smaller benefits should be recompensed for that injury. The Court refused to approve an award of damages in *Manhart* and it should do so in the instant case for the same reasons.

The factors relied on in *Manhart* for refusing to approve an award of damages are clearly stated in that case. Damages were denied plaintiffs because (1) "Title VII does not require a district court to grant any retroactive relief." (435 U.S. at 718); (2) "conscientious and intelligent administrators . . . may well have assumed that [the] program . . . was entirely lawful" and that a program which treated men and women equally would have been illegal (*id.* at 720); (3) a back pay award was not necessary to require conformity to the *Manhart* decision (*id.* at 721); (4) of "the potential impact which [retroactive relief] may have on the economy" (*id.* at 721) and (5) "[r]etroactive liability could be devastating for a pension fund." Id. at 722.

The *Manhart* elements are pertinent to the instant case in that: (1) while Title VII does not require retroactive relief, neither does it require prospective relief; (2) since both Los Angeles Dept. of Water & Power and PERS were trying to accomplish exactly the same purpose of assuring that men and women would be treated equally as a group, the PERS administrators were justified in assuming not only that their plan was lawful but that a plan which did not treat men and women equally would have been illegal; (3) a back pay award is not necessary in the instant case because the PERS plan had been changed to conform with the *Manhart* decision before that decision was handed down; (4) and (5) there is no meaningful difference in impact on the economy or any affected pension fund if the fund is

required to pay out millions of dollars whether the payment is labeled "retroactive pay" or "increased pension payments". Thus *Manhart's* rationale in refusing to order retroactive payments is fully applicable here.

Even though there are differences between the contribution plan at issue in *Manhart* and the benefit plan of the instant case, the principles set forth in *Manhart* can properly be applied to the instant case (and, in fact to all benefit cases). The Ninth Circuit, however, failed to do so and that failure can have far reaching consequences.

II

THE NINTH CIRCUIT MISCONSTRUED, IGNORED AND MISAPPLIED THE MANHART PRINCIPLES

The foundation of the relief analysis by the Ninth Circuit is its reliance on *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405 (677 F.2d at 736) a case considered by *Manhart* but rejected insofar as it applied to confirmation of retroactive relief granted by the District Court. 435 U.S. at 702.

The Ninth Circuit's analysis in relation to relief is then divided into three parts: Part A (677 F.2d at 737) which held that employees who had retired before March 24, 1972 (the date Title VII became applicable to public employees) were entitled to no relief; Part B (*id.* at 737-738) in which it was held that employees retiring after that date are entitled to prospective benefit payment adjustments; and Part C (*id.* at 738) where the Court held that the prospective benefit payment adjustment should be made retroactive to the date of the *Manhart* decision. Petitioners' concerns, and this request for certiorari are directed solely to Parts B and C.

Part B deals in substance with exactly the same problem presented by Part IV of *Manhart* (435 U.S. 718-723):

whether or not to require the pension fund to make cash payments to eliminate the prohibited sex differential by compensating those individuals who have received less in benefits than the opposite sex. Nevertheless, in making its analysis, the Ninth Circuit chose to ignore all of the pertinent factors relied on by this Court in *Manhart* except for the effect of such an order on the fund. The Ninth Circuit did not ignore that factor; it misapplied it.

The Ninth Circuit offered no comment on *Manhart's* stated reliance on: (1) the non-mandatory nature of retroactive relief (677 F.2d at 736-738); (2) the fact that conscientious administrators may have properly thought that their plans were legal; (3) the Court's concern regarding the potential impact on the economy of requiring pension funds to make large payments to beneficiaries (*id.*); and (4) no monetary award was necessary to assure compliance with *Manhart*.[6]

The Ninth Circuit paid heed to only one of the standards enunciated in *Manhart*. The decision showed concern for "the danger of 'staggering damage awards' on pension funds." *Id.* at 737. The concern, however, was resolved by a simple statement that,

> We are persuaded that the language of *Manhart* should be read as generally requiring courts to exercise caution when designing relief that affects pension and retirement funds. The relief granted below to class members retiring after the effective date of Title VII exhibits just such a cautionary approach.

Id. at 737. Footnote omitted.

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6. The PERS plan was changed *before* the date of the *Manhart* decision so that it had neither sex differentiated payments nor benefits.

Such a holding flies squarely in the face of the Court's ruling in *Manhart* that,

> The plaintiffs assert that the award in this case would not be crippling to these defendants, because it is limited to contributions between 1972 and 1975. *But we cannot base a ruling on the facts of this case alone.* As this Court noted in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, *equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'"*

435 U.S. at 722, fn. 42. Emphasis added.

There are very substantial consequences to the Ninth Circuit's "interpretation" of this *Manhart* requirement.

The *Manhart* decision represents a carefully crafted analysis of the problems involved in requiring pension funds to pay large amounts in damages. At least as to the issue of damages (be they back pay or adjustments as to future benefits) the Ninth Circuit decision has the effect of virtually destroying Part IV of the *Manhart* decision. If the Ninth Circuit decision is allowed to stand the question of whether or not to require a pension fund to pay damages will rest in the discretion of district courts throughout the land. There would be no national policy on this issue and the tests meticulously detailed by this Court would be of no effect.

The damages awarded could greatly exceed the scope of the award which this Court refused to approve in *Manhart*[7]

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7. *Manhart* refused to approve retroactive payments for the three-year period between 1972 and 1975 (435 U.S. at 722, fn. 42) yet the Ninth Circuit in the instant case approved an order which extended the pension funds' liability for retirees to the five-year period from 1972 to 1977 and which would require payments for years in the future. 677 F.2d at 736-738.

even though the challenged plan was corrected before or shortly after the *Manhart* decision.

The *Manhart* defendants' breach of duty "cannot be differentiated in policy" from PERS' either in its effect on members or in its relationship to Title VII, but the resultant judgment in the instant case is vastly different in the amount of money the fund must pay and the legal principle it creates for future benefit cases.

In Part C, the Ninth Circuit approved "the prospective relief of increased benefits retroactive to the date of the *Manhart* decision." 677 F.2d at 738. This was accomplished by distinguishing *Manhart*.

> But, *Manhart* is distinguishable from the present case because: (1) after the decision in *Manhart*, pension plan administrators could no longer reasonably think that the distribution of unequal benefits did not violate Title VII; and (2) in view of *Manhart*, the award should have been foreseen and taken into account by administrators, thus lessening the financial impact on the pension plan. *Manhart* does not bar the prospective relief of increased benefits retroactive to the date of the *Manhart* decision.

Id. at 738. Footnote omitted.

The "distinction" simply is a restatement of the basic question presented by the instant case: does continued distribution of sex differentiated benefits violate Title VII if the challenged retirement plan had eliminated sex differentiated contributions and benefits for all those who retired after January 1, 1977, a date before *Manhart* was issued?

Every benefit plan will present questions regarding the application of *Manhart* to continuing sex differentiated payments after the date the plan is brought into conformity with the requirements of Title VII. Certiorari should be granted to clarify this problem which is national in scope.

III

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE APPLICATION OF THE TWO-YEAR LIMITATION TO ALL BENEFIT PLANS.

Certiorari should also be granted to clarify the application of the two-year back pay limitation in 42 U.S.C. § 2000e-5(g). That section provides, in relevant part, "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

The applicability of this provision was presented to, and ignored by, the Ninth Circuit. App. Op. Br. 42. Petitioners argued that the earlier EEOC complaint was filed on January 21, 1977, thus creating a two-year back pay period that commenced January 21, 1975 and that, accordingly, "no plaintiff may receive increased retirement benefits predicated on service before that day." *Id.*

The applicability of the two-year limitation to ordinary wage or promotion cases is quite simple; it is not as simple when applied to the prospective payment of wages (in the form of pension benefits) for work done more than two years before the filing of an EEOC complaint.

The obvious intent of the two-year limitation on awards of back pay was to restrict the amount of damages even a guilty employer would have to pay. Thus, for example, an employer who has been paying women less than men for the same work since the enactment of Title VII would have to compensate the women for only the two years preceding the filing of the EEOC complaint even though the employer had been been violating the law for 18 years. An employee who had not worked for the two years preceding the filing of the claim would get nothing because that employee would have earned nothing in that time and thus would be entitled to no back pay.

Manhart did not consider this problem since it did not allow any retroactive relief. But if back pay had been allowed in the form of giving women extra pay to compensate them for the larger pension contributions they had been required to make, it seems clear that such payment could not have been required for more than the two years immediately preceding the filing of a claim with the Commission. See: *Manhart*, 435 U.S. at 722, fn. 42.

The Ninth Circuit refused, *sub silentio*, to apply the two-year limitation to the facts of the instant case. The Court approved an award of benefits to employees who had retired as early as 1972, five years before the EEOC claim was filed.

Under the plain language of the two-year restriction a former employee who had not worked during the two years prior to the filing of the EEOC complaint is awarded no damages. But because the Ninth Circuit refused to apply the two-year provision employees who had been retired for five years before the filing of the EEOC complaint are awarded full damages in the form of increased pension benefits for the rest of their lives.

It is clear on the facts of this case (and it will be clear in all, or substantially all, benefit cases) that retirement benefits are part of the compensation earned each year by an employee.[8] The fact that the compensation is paid as increased pension benefits in some future year makes it no less pay for services already rendered and thus the increased benefits constitute back pay subject to the two-year limitation.[9] The issue of applicability of the two-year

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8. The total pension benefit is a function of the number of years worked.

9. Many public entities, including the State of California, now engage in federally approved deferred compensation programs. Compensation earned now is not paid to the employee until after retirement yet it surely remains compensation for purposes of Title VII litigation.

restriction will be present in benefit cases and in those contribution cases where it is determined that an award of back pay is appropriate.

Certiorari should be granted to resolve this important question.

IV

THE NINTH CIRCUIT'S DECISION SPECIFICALLY REFUSED TO APPLY THE BASIC TESTS ENUNCIATED BY THIS COURT TO ESTABLISH TITLE VII VIOLATIONS.

A basic question presented by this case is whether or not petitioners' retirement plan violated Title VII before the plan was amended in 1977. This Court has, over the years, set forth several tests to use in establishing Title VII violations. Perhaps the most basic statement of what was made illegal by Title VII appears in the landmark case of *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, where this Court handed down its definitive statement regarding the purposes of Title VII: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve the equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-430.

Or, as the Court restated: "Discriminatory preference for any group, minority or majority, is precisely *and only* what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 430. Emphasis added.[10]

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10. Petitioners understand that "employment" in this context means not only obtaining a job but also having working conditions free of prohibited discrimination.

Petitioners' argument (App. Op. Br. 14-18) that they had not violated Title VII because the retirement plan did not "erect barriers to the employment market against a protected group" (*id.* at 430) was met by the Ninth Circuit's response that,

> The State cites cases that note that the congressional intent of Title VII was to remove barriers to employment based on sex. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). But these cases do not establish a *requirement* that the challenged practice be a practical barrier to employment in order to establish a Title VII violation. The plain language of the statute does not require such a showing.[3]

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3. Moreover, there was no discussion of this requirement in *Manhart*. The Supreme Court implicitly rejected imposing such a requirement when it discredited the defendant's argument in *Manhart* that equalizing contributions was discriminatory to male employees. The defendant contended that male employees would leave their jobs to obtain a better pension plan if equal contributions were required. The court noted that the Department's claim was unsubstantiated 'presumably because an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market.' 435 U.S. at 716 n. 30, 98 S.Ct. at 1379, 55 L.Ed.2d at 670.

677 F.2d at 735-736.

Petitioners submit that this is an egregious misinterpretation of *Griggs* and *Manhart* and that the footnote reference to *Manhart* offered in support of the proposition is totally unsupportive of the Court's ruling.

An action (or a lack of action) by an employer which does not affect anyone's employment opportunities is not a

violation of Title VII. If there is "equality of employment opportunity" and if there is no [d]iscriminatory preference for any group, minority or majority" (*Griggs*, 401 U.S. at 430) then Title VII, as it has been interpreted by this court, has not been violated.

In the instant case the Ninth Circuit affirmed an order which gave increased pension benefits to both men and women thus necessarily holding that both men and women were discriminated against by the PERS retirement plan. How, petitioners asked the Ninth Circuit, can there be discriminatory preference for both men and women? (App. Op. Br. 19-21). If both men and women were discriminated against who possibly could have been treated more favorably? *See: Furnco Const. Corp. v. Waters* (1973) 433 U.S. 567, 577. Men and women obviously comprise the entire work force of any employer and there can be no group which receives treatment more favorable than that provided to men and women.

The necessity for the existence of both a favored and a disfavored group is also illustrated by the development of the law relating to facial discrimination as opposed to facially neutral discrimination. Facial discrimination involves purposefully discriminatory treatment of a protected group. In *Teamsters v. United States* (1976) 431 U.S. 324, it was alleged that "the company, in violation of § 703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans *less favorably than white persons.*" *Id.* at 335. Emphasis added, footnote omitted. If the instant case constitutes facial or purposeful discrimination, it must be shown that men and women both were treated less favorably than some other group. What group?

"Facially neutral" or "disparate impact" cases require that the challenged action have a "disparate impact", that

is an impact which is greater on one group than another. There can be no disparate impact unless two groups exist to illustrate the disparity. *See: Dothard v. Rawlinson* (1976) 433 U.S. 321. If the instant case is viewed as involving a facially neutral plan, there can be no violation of Title VII unless the challenged retirement plan had a greater impact on men and women than it had on some other group. There is, of course, no other possible group.

Finally, the lack of illegal discrimination is shown by the fact that when retirees are grouped on the basis of whether they received higher or lower benefits than comparably situated members of the opposite sex members of both sexes are found in each group. The group composed of those who receive more than the opposite sex is made up of women who retired before age 60 and men who retired after age 60. Those who receive less than the opposite sex are women who retired after age 60 and men who retired before age 60. A retirement plan that produces such a result does not violate Title VII. *General Electric Co. v. Gilbert* (1976) 429 U.S. 125.

The Ninth Circuit rejected each of these arguments, in turn, as follows: (1) "that the plan results in different benefits for the sexes at different ages [is] the necessary result of using sex-differentiated tables" (677 F.2d at 735)[11] (2) the decision flatly rejected this Court's holding in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424 by holding that it does "not establish a *requirement* that the challenged practice be a practical barrier to employment in order to establish a Title VII violation" (677 F.2d at 736; emphasis in original) and finally (3) that the petitioners' *Gilbert*

11. The Court supported this holding by stating in footnote 2 on page 735, "A woman who retires before age 60 would receive more each month than a similarly situated man because, as a group, men are expected to live fewer years than women, as a group."

argument must fail because "the benefit payments under the 1971-1977 plan are explicitly based on the sex of the retiree . . . ." *Id.* at 736.

None of these responses stands up under the analysis suggested above and certainly none deals adequately with the problem of whether or not a pension plan can discriminate against both men and women.

Because sex has historically been used as a factor in establishing pension plan benefits and contributions, it is particularly important in that area that the questions raised by petitioners regarding the existence of a Title VII violation be considered by this Court. But classifications based on sex are not limited to the retirement field and thus it becomes even more important that a writ of certiorari issue so that this fundamental question can be resolved.

CONCLUSION

Each of the states has a retirement system for its employees; several have plans in which the level of benefits is determined, at least in part, by the employee's sex. Tax Foundation, Inc.; Employee Pension Systems in State and Local Government, 1976 App. Table 5, pp. 62-63. Although no authority has been found on this question, petitioners' research leads them to believe that many retirement systems of political subdivisions have sex differentiated benefits. Available options (a form of benefit), such as payment of pension benefits to a deceased retiree's survivors, frequently have a sex differentiated basis.[12]

In *Manhart* the Court issued guidelines regarding the awarding of back pay in contribution plan cases. Petitioners submit that these guidelines are appropriate for application to benefit plan cases but that the Ninth Circuit misinterpreted and misapplied those guidelines. Because of the nature of the *Manhart* decision there was no need to rule on the application of the two-year limitation on back pay; however, both in future contribution cases and in all benefit cases there is an urgent need for clarification of the scope and application of that limitation.

Finally, all of these questions would be moot in relation to the instant case if the Ninth Circuit had properly applied this Court's rulings regarding violations of Title VII. Every Title VII case will present a question regarding the purpose

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12. A petition for a writ of certiorari is currently pending before this Court in relation to such a problem. *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*. A case pending in a California state court raises similar option-related questions. *Retired Public Employees' Association of California v. Board of Administration, Public Employees' Retirement System*, Sacramento County Superior Court No. 303286. An informal partial survey of other states has shown that option benefit litigation has also arisen in some states.

of Title VII litigation and the effect of the purpose on establishing a violation. Sex discrimination cases may well present the issues raised by this case.

Each of the issues presented by the instant case will create effects that range far beyond the bounds of this litigation. A writ of certiorari should issue to resolve these important and far-reaching issues.

Respectfully submitted,

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Appendix A

RETIRED PUBLIC EMPLOYEES' ASSOCIATION OF CALIFORNIA, et al.,
Plaintiffs/Appellees,

vs.

STATE OF CALIFORNIA, et al.,
Defendants/Appellants.

No. 80-4246.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 13, 1981.

Decided May 17, 1982.

Class of public employees sued State of California, alleging that the state had discriminated in the payment of retirement benefits in violation of Title VII. The United States District Court for the Northern District of California, William A. Ingram, J., rendered judgment for the public employees and State appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, held that: (1) the plan, which discriminated in benefit levels on the basis of sex, violated Title VII; (2) employees who retired prior to the date that Title VII became applicable to public employees were not entitled to relief; and (3) employees who retired after that date were entitled to prospective relief, as well as relief retroactive to the date of the Supreme Court's decision in *City of Los Angeles v. Manhart.*

Affirmed in part and reversed in part.

1. Civil Rights—9.14

Pension plan which discriminated in benefit levels on basis of sex violated Title VII even though it discriminated against different sexes at different ages. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

2. Civil Rights—9.10

Practice need not be practical barrier to employment in order to establish Title VII violation. Civil Rights Act of 1964, § 701 et seq as amended 42 U.S.C.A. § 2000e et seq.

3. Civil Rights—9.14

Pension plan which discriminated in benefit levels on basis of sex was not legal under rationale of Supreme Court's decision in *General Electric Co. v. Gilbert*. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

4. Civil Rights—46

Relief from State's discriminatory pension plan would be limited to those class members who retired after date Title VII became applicable to public employees, March 24, 1972. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

5. Civil Rights—46

Members of pension plan who received lower monthly retirement benefit than similarly situated members of opposite sex, and who retired after March 24, 1972, the date that Title VII was applied to public employees, were entitled to prospective equalization of benefits as well as retroactive relief to date of Supreme Court's decision in *City of Los Angeles v. Manhart*, in which the Court prohibited discrimination on basis of sex in required contributions to pension plan. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

Robert E. Murphy, Deputy Atty. Gen., San Francisco, Cal., for plaintiffs/appellees.

Fred D. Lonsdale, Davis, Cowell & Bowe, San Francisco, Cal., for defendants/appellants.

Appeal from the United States District Court for the Northern District of California.

Before ANDERSON and SCHROEDER, Circuit Judges, and RICHEY,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

I. FACTS

A class of public employees sued the State of California, alleging that the State had discriminated in the payment of retirement benefits to the class in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The district court certified the class as all members of the California Public Employees Retirement System (PERS) who retired before January 1, 1977, and who are now receiving a lower monthly retirement benefit than similarly situated members of the opposite sex. The court then found that the pension plan violated Title VII and granted summary judgment in favor of the class. The court ordered the State to increase the benefit levels of the class retroactive to the date of the Supreme Court's decision in *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). The State appeals. We affirm in part and reverse in part.

II. TITLE VII VIOLATION

The retirement plan in dispute was operated by the State of California from 1971 until 1977. It required equal contributions from all employees but differentiated in the level

*The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

of benefits to similarly situated employees on the basis of sex.[1]

The district court, in holding that this plan violated Title VII, relied upon *Manhart, supra.* In *Manhart,* the Supreme Court held that a pension plan which required female employees, who received the same benefits under the plan as similarly situated male employees, to make higher contributions to the fund than male employees violated Title VII.

The defendant in *Manhart* argued that the higher rate was necessary to meet the greater costs of pensions for females who, as a class, have a longer life expectancy than males, as a class. *Manhart* does not dispute the actuarial assumption that women, as a class, live longer than men. But the Court held that Title VII prohibits the practice of requiring higher contributions from female employees based upon statistical averages for women. The Court noted that the statute's focus on the individual was unambiguous and that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.*, 435 at 708, 98 S.Ct. at 1375, 55 L.Ed.2d at 665. It concluded that the practice in question did not even pass the "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 711, 98 S.Ct. at 1377, 55 L.Ed.2d at 667 (quoting *Developments in the Law, Employment Discrimination and Title VII of*

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1. Until 1971, the State's retirement plan differentiated on the basis of sex with regard to both contributions to and benefits from the fund. The State does not dispute that his earlier plan violates Title VII. Rather, the State argues that the continued payment of benefits under any plan in effect before the date of the *Manhart* decision does not violate Title VII. After 1977, the State equalized both contributions and benefits for male and female employees. Cal. Gov't Code § 21251.13 (West 1980).

the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1174 (1971).

The State argues that their retirement plan does not violate Title VII because: (1) the defferent benefit levels do not favor any particular class; (2) the plan is not a barrier to employment; and (3) the plan is valid under the rationale of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). We cannot agree.

[1] That the plan results in different benefits for the sexes at different ages,[2] the necessary result of using sex-differentiated tables, does not save the plan from Title VII attack. Although contributions made by male and female employees are equal, benefits levels differ under the plan. A woman who retires before 60 will receive a higher benefit than a similarly situated male who retires before 60. Retirement after 60 results in a more favorable benefit to the male employee. This is precisely the type of class-based sex

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2. To account for the actuarial assumption that women as a class live longer than men, the plan distributes benefits at different rates depending upon the sex of the retiree. The State's tables set up a retirement target age of 60. Similarly situated men and women who retire at age 60 receive equal benefits. Individuals, however, often retire at an age other than the target retirement age. If the total average lifetime benefit is to be equal, it is necessary to adjust the monthly benefit to reflect the actuarial assumption that the fund of contributions and investment income will be paid out over a different number of years. Thus if a man retires at 60, he may be expected to live 20 years. But if that man retires at 59, there is a change in life expectancy and an expectation that there will be more monthly payments. The result is a decrease in benefits each month to reflect that actuarial assumption.

If, at age 60, an average woman is expected to live 25 years and she retires at age 59, there will be an expectation of more monthly payments because there is a change in life expectancy. Because the average woman's life expectancy is greater, however, the change in life expectancy is a lower percentage, i.e.,1/25 or 4% compared with 1/20 or 5%. Thus payments in that year are a higher percentage of the actuarial benefit. A woman who retires before age 60 would receive more each month than a similarly situated man because, as a group, men are expected to live fewer years than women, as a group.

discrimination that *Manhart* prohibts. We do not read *Manhart* to permit discrimination againt one sex so long as the State discriminates in another manner against the other sex.

[2] The State cites cases that note that the congressional intent of Title VII was to remove barriers to employment based on sex. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). But these cases do not establish a *requirement* that the challenged practice be a practical barrier to employment in order to establish a Title VII violation. The plain language of the statute does not require such a showing.[3]

[3] The State also argues that the plan is valid under the rationale of *General Electric Co. v. Gilbert, supra.* In *General Electric,* the Supreme Court found that the exclusion of pregnancy benefits from a disability insurance program did not violate Title VII. The court held that the exclusion did not discriminate against women as a class. Rather the disability benefit plan classified two groups—pregnant persons and non-pregnant persons. The court in *Manhart* distinguished *General Electric* because "on its face, this plan discriminates on the basis of sex whereas the General Electric Plan discriminated on the basis of a special physical disability." 435 U.S. at 715. In the present case, as in *Manhart,* the benefit payments under the 1971-

3. Moreover, there was no discussion of this requirement in *Manhart.* The Supreme Court implicitly rejected imposing such a requirement when it discredited the defendant's argument in *Manhart* that equalizing contributions was discriminatory to male employees. The defendant contended that male employees would leave their jobs to obtain a better pension plan if equal contributions were required. The court noted that the Department's claim was unsubstantiated "presumably because an employe who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market." 435 U.S. at 716 n.30, 98 S.Ct. at 1379, 55 L.Ed.2d at 670.

1977 plan are explicitly based on the sex of the retiree and thus the State's argument must fail.[4] The 1971-1977 plan violates Title VII.

III. RELIEF

The district court's April 25, 1980 order requiring the State defendants (appellants) to "raise monthly retirement benefits of members of the class to the level received by similarly situated members of the opposite sex without reducing the benefits of any individual" is a remedy consistent with that court's discretionary power to award equitable relief under the act. *See* 42 U.S.C. § 200e-5(g). This court may review such an award to determine whether the district court abused its discretion "to locate a 'just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). We affirm that part of the district court's order granting relief to members of the class who retired after March 24, 1972, the date Title VII became effective as to public employees. *See* 42 U.S.C. § 200e(a). However, we reverse that part of the order granting relief to class members who retired prior to the 1972 effective date.

The State asserts that the district court's award of relief is impermissibly retroactive in the sense that it affects pension rights that vested before the plan became illegal under Title VII. Here, the State argues that each employee's pension rights vested in incremental amounts upon the date of each contribution to the fund. The State carries its argument a step further, contending that the retirement plan violated Title VII only after the *Manhart* decision. Accept-

4. Nor does *Dothard v. Rawlinson*, 433 U.S. 321, 328, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977), support the State's argument. Although *Dothard* required a showing of disproportionate impact,

ing the latter argument makes the State liable for no additional payments because the State argues that all of the retirees' rights vested before *Manhart* was announced in 1978.[5]

A.

[4] We accept the State's approach to the question of relief only partially. The State's argument that each contribution to the fund froze the rights of the retiree is not persuasive. But, the State's argument that the district court's award of relief affects vested rights is persuasive as to those members of the class who retired before Title VII became applicable to public employees on March 24, 1972. Until that date, the State's retirement plan was not illegal and the pension rights of class members retiring prior to that date were fixed.

We conclude that *Manhart* and general equitable principles require that federal courts not upset the payment of fixed benefits under a pension plan that was legal on the date of the person's retirement. Therefore, the relief shall be limited to those class members who retired after the date TitleVII became applicable to public employees.[6] A similar

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it involved the application of neutral standards, *i.e.*, height and weight requirements that operated in an allegedly discriminatory manner. This case involves practices that discriminate on their face on the basis of sex.

5. Thus the State contests the payment of any increased level of benefits, from either the date of *Manhart* or from the date of the dsitrict court's judgment. This is a different and more far-reaching argument than that the district court's award of increased benefits to the class *retroactive* to the date of the *Manhart* decision was inappropriate.

6. It is true that in some cases the continuing effects of past discrimination have been remedied when those effects extend past

result has been reached by the Fifth Circuit in *Scammel v. City of Dallas*, 565 F.2d 955 (5th Cir. 1978) (per curiam). Such a result makes the application of Title VII with respect to retiree coextensive with the Employee Retirement Income Security Act of 1974, which expressly provides that the Act's benefits are not available to persons who retired prior to its effective date. *See* 29 U.S.C. § 1061(b)(2); *Haeberle v. Board of Trustees*, 624 F.2d 1132, 1137 (2d Cir 1980).

B.

[5] As to the post-effective date retirees, the State attempts to avoid prospective benefit payment adjustments by arguing that the retirement plan violated Title VII only after the *Manhart* decision. The State contends that *Manhart* established a general hands-off rule with regard to Title VII remedies affecting pension plans that were adopted before *Manhart*. We think the State reads *Manhart* too broadly. The Court in *Manhart* rejected a claim for backpay in a case in which a pension plan violated Title VII by requiring female employees to make higher contributions than males while receiving identical benefits. The Court did not address the propriety of prospective relief in the

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the effective date of Title VII. *See, e.g., Moore v. City of San Jose*, 615 F.2d 1265, 1273 (9th Cir. 1980). However, it must be noted that in *Moore*, the public employees group was small, involved no retroactive pay, and the retroactive seniority rights granted to a few women whose employment dates preceded March 24, 1972, came about only after reaching the carefully negotiated agreement settling the conflicting claims of the parties. The case did not involve a litigated award. In *Moore*, we did not pass upon Title VII retroactive pay awards in the public sector. We merely upheld the district court's finding that the settlement was fair and reasonable, especially noting that the retroactivity for seniority was based upon a Fourteenth Amendment equal protection claim as applied to public sector employees. 615 F.2d 1265, at 1272-73.

form of equalized benefits paid to post-effective date retirees under plans requiring equal contributions, but violating Title VII because of a discriminatory benefit payment feature. *Manhart's* rejection of a backpay award was not equivalent to a pronouncement of non-retroactivity precluding prospective benefit adjustments for employees retiring under pre-*Manhart* plans.

Although the pension plan at issue in *Manhart* had been altered by the time the case reached the Supreme Court, the Court let stand an injunction against the higher contribution rate, thus granting relief that limited the future operation of the fund. What the Court did note with apparent approval was the proposal of commentators that the judiciary exercise discretion to cure the danger of "staggering damage awards" on pension funds. *Manhart, supra,* 435 U.S. at 723, n.44, 98 S.Ct. at 1383, n.44, 55 L.Ed.2d at 674, n.44. We are persuaded that the language of *Manhart* should be read as generally requiring courts to exercise caution when designing relief that affects pension and retirement funds. The relief granted below to class members retiring after the effective date of Title VII exhibits just such a cautionary approach.[7] Moreover, this court has recently approved of the granting of relief in the form of prospective equalization of benefits in a case factually similar to the present case. *See Norris v. Arizona Governing Committee, etc.,* 671 F.2d 330 (9th Cir. 1982). We accordingly approve the order below granting prospective equalization of benefits to class members retiring after March 24, 1972.

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7. By order dated May 29, 1979, the district court concluded:
"Both sides rely on the *Manhart* decision in support of their respective motions. Plaintiffs contend that *Manhart* forbids the use of sex-based actuarial tables in calculating retirement benefits. Defendants, however, argue that an exception to

C.

Nor are there any compelling reasons justifying the position that the appropriate relief should not be made retroactive to the date of the *Manhart* decision. In *Manhart*, the Supreme Court did reverse the backpay award of the higher contributions made by the female employees. The Court gave three reasons for the reversal: (1) pension plan administrators could have reasonably thought that requiring higher contributions from female employees did not violate Title VII; (2) a retroactive award was not necessary to force administrators to mend their ways; and (3) such a backpay award, unforeseen by the administrators, could have a devastating financial impact on the pension plans and the great number of people who depend upon them. 435 U.S. at 718-23, 98 S.Ct. at 1380-83, 55 L.Ed.2d at 671-74.

In this case, as in *Manhart*, a retroactive award is not necessary to force administrators to mend their ways. The State's present retirement plan distributes equal benefits to similarly-situated male and female employees who retired after January 1, 1977. But, *Manhart* is distinguishable from the present case because: (1) after the decision in *Manhart*, pension plan administrators could no longer reasonably think that the distribution of unequal benefits did not violate Title VII; and (2) in view of *Manhart*, the

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Manhart exists where compliance would have an economically devastating effect on the pension fund. (*See Manhart, supra*, 98 S.Ct., at 1380-1383). The Court finds defendants' argument unpersuasive. Even if *Manhart* could be read so broadly as to permit the *present* and *continuing* payment of unequal pension benefits to recipients due solely to their sex, the Court does not feel that defendants have made a sufficient factual showing of such an adverse economic effect on the fund." The above finding demonstrates that the district court cautiously evaluated the economic effects of its proposed relief.

award should have been foreseen and taken into account by administrators, thus lessening the financial impact on the pension plan. *Manhart* does not bar the prospective relief of increased benefits retroactive to the date of the *Manhart* decision.[8]

We reverse that portion of the district court's order requiring benefit payment adjustments for class members who retired prior to March 24, 1972. All other portions of the district court's order are affirmed.

AFFIRMED in part and REVERSED in part.

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8. The State also contends that the class representatives did not adequately defend the interests of all the class members on this appeal. The State bases its argument on the representatives' use of examples in their appellate brief that focus on the detriment suffered by the female members of the class as a result of the retirement plan.

The argument borders on the frivolous. In most cases, the arguments that use references to women in the examples are equally valid when replaced by references to men. Moreover, the focus upon the impact of the plan on women was designed to respond to the State's major argument that the overall effect of the retirement plan must favor one group over another to violate Title VII. It would have been inadequate representation if the class representatives simply hoped that the State's view would not be adopted and did not try to argue that even if this view were correct, the plan does favor one class over another. The class representatives have strongly defended the position that the benefit levels of both male and female members who have been discriminatorily treated should be raised.

Appendix B

In the United States District Court
For The Northern District of California

NO. C-77-2008 WAI
NO. C-78-2070 WAI

RETIRED PUBLIC EMPLOYEES' ASSOCIATION OF CALIFORNIA, CHAPTER 22, et al., and JACOB B. GUNN, et al.,

Plaintiffs,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

ORDER AND JUDGMENT

The separate issues in the above entitled action as to the Public Employees' Retirement System of the State of California presented in GUNN v. STATE OF CALIFORNIA, et al and RETIRED PUBLIC EMPLOYEES, et al., v. STATE OF CALIFORNIA, et al., having been heard, summary judgment having been granted to plaintiffs, and the State defendants' motion for reconsideration having been denied, and upon consideration thereof, and counsel having so stipulated, and it further being expressly determined that there is no just reason for delay and expressly directed that final judgment upon said separate issues be entered, it is

ORDERED, ADJUDGED AND DECREED:

1. It is ORDERED that this action may proceed as a class action pursuant to FRCP 23(b)(2) on behalf of a class of all retired employees who are members of the California Public Employees Retirement System who retired

prior to January 1, 1977, and who are receiving a lower monthly retirement allowance than similarly situated members of the opposite sex.

2. That the State defendants' present and continuing practice of paying pension benefits based on sex-based actuarial tables violates Title VII of the Civil Rights Act of 1964.

3. It is FURTHER ORDERED that in order to remedy the State defendants' treatment of the class found unlawful by this Court as set forth in its Order dated May 29, 1979, the Public Employees Retirement System shall raise monthly retirement benefits of members of the class to the level received by similarly situated members of the opposite sex without reducing the benefits of any individual. Such adjustments shall be retroactive to April 25, 1978, the date of the U. S. Supreme Court decision in *City of Los Angeles v. Manhart*, 435 U. S. 702 (1978).

4. Interest shall be paid at the rate of 7% per annum on such benefits from the date of accrual to date actually paid.

5. It is FURTHER ORDERED that costs and attorneys' fees shall be paid to attorneys for plaintiffs in an amount to be determined following the submission of applications by plaintiffs' counsel.

6. This court reserves jurisdiction in the event there is any dispute about the actual amount of the benefits to be paid to any class member.

DATED: April 25, 1980

Judge, United States District Court
Northern District of California

Appendix C

42 USC § 2000e-2(a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USC § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall

require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

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